

No. 21704

IN THE

SEP 13 1968

United States Court of Appeals

FOR THE NINTH CIRCUIT

DON THE BEACHCOMBER,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITIONER'S REPLY BRIEF.

FILED

OCT 20 1967

SWEENEY, COZY & FOYE,

M. J. DIEDERICH,

639 South Spring Street,
Los Angeles, Calif. 90014,

Attorneys for Don The Beachcomber.

WM. B. LUCK, CLERK



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In General.

Initially, it is necessary to point out certain inaccuracies and comment upon certain inferences contained in the Board's brief.

Point One:

On page 3 of its brief, the Board inaccurately states and infers that the union informed Fine it "represented a majority of the employees in the Palm Springs restaurant."

This is not true. On March 8, the union representatives called upon Fine shortly before the noon hour without an appointment and without any notice they were coming. As Mrs. Perrigo, its Secretary-Treasurer, stated:

Between Mr. Jones and myself we introduced ourselves to Mr. Fine and told him that we represented a *portion of his people* in Palm Springs and that we would like to have a meeting. [R.T. 64-65.] (Emphasis added.)

It is clear Perrigo at that time did not state the union represented a majority of employees in an appropriate bargaining unit.

Nor does the union's letter of March 8, 1966 [General Counsel's Ex. 4] to Fine inform him that the union represented a majority of the employees in the Palm Springs restaurant.

That letter stated:

An overwhelming majority of your employees have signed Authorization Cards for us to represent them and we will submit to an impartial third party to review and verify our Authorization Cards if you so desire. (Emphasis added.)

That statement, of course, was proven to be false, for not only did the union lack the *overwhelming majority of signed authorization cards*, it lacked even a simple majority.

Thus the Board presents the supreme irony: it accuses Petitioner of acting in bad faith in doubting the union's claim that a majority of its employees had signed authorization cards when, in fact, Petitioner was right, a majority of its employees had not signed authorization cards.

In effect, Petitioner has been found guilty of some sort of illegality because it did not believe a claim which later was proven to be false.

Point Two:

On March 9, Fine received a letter from Perrigo requesting an appointment within ten days, at his convenience, to discuss a union agreement. By letter,

*The previously unavailable citation for *Wasau Steel Corp. v. N.L.R.B.*, cited in Petitioner's Opening Brief, is 377 F. 2d 369.

dated March 11, the union's attorney, for the first time, claimed to represent a majority of employees and requested a meeting as soon as possible. March 12 and 13 were Saturday and Sunday, so March 14 was the first regular business day the letter [Charging Party's Ex. 1] could have been received. Displaying a great deal of impatience at not having received a reply by March 15 to a letter which Petitioner only received on March 14, the union filed a representation petition with the Board on March 15. The filing of the representation petition by the union also occurred four days in advance of the expiration of the ten-day time limit for discussions suggested in its letter of March 8, 1966.

While Petitioner's reply [General Counsel's Ex. 5] to Perrigo's letter used no magic words, it fairly conveyed the company's belief that the union did not represent a majority of its employees and was written after being advised the union had already filed its petition. Yet the Board infers a lack of good faith doubt from the letter, even though written with the knowledge that the union was willing to have an election and had, in fact, petitioned the Board to hold an election.

The Board in its brief quotes only part of the Petitioner's letter, making no reference to those parts which evince Petitioner's good faith:

If a majority of our employees in that (appropriate) unit in the election indicate they desire Local 535 to represent them for purposes of collective bargaining, the employer will be pleased to meet with you to negotiate a collective bargaining agreement.

Point Three:

It is not accurate as the Board states in its brief (p. 4) that Fine asked Service Manager Aranas to find out if the union represented a majority of the Palm Springs employees and that Aranas told Jordan that he understood many employees had signed authorization cards.

The fact is that Fine told Aranas the union claimed an overwhelming majority of the employees had signed cards and to see if it was true. Later, when Aranas talked to Jordan, he simply said, "I heard that you boys have signed for the union." [R.T. 303.] The term "boys" referred only to the dozen or so Filipino waiters and bus boys. Neither Fine nor Aranas said anything to indicate the union was claiming to represent a majority of employees. They were talking about the union's claim that an overwhelming majority of all the employees had signed cards, which was not true.

Point Four:

The meeting was attended only by about a dozen Filipino waiters and bus boys. [R.T. 304.] There were approximately 40 other unit employees who did not attend the meeting. Consequently, a few days later when Aranas spoke to Fine again, he was only reporting what he knew about the dozen or so Filipino waiters or bus boys who attended the meeting. Aranas was never in a position to state that a majority of the 52 unit employees had signed cards because he had only contacted about 12 employees that weekend.

Point Five:

The testimony by Leonard Mandapat that Aranas approached him and said, "So you are one of the union

organizers,” that Mandapat replied, “So what. I think it is right,” and that Aranas then stated, “You boys are crazy. You don’t know what you are doing. You don’t know what you are going to be missing if you join the union,” must be read in context to be properly evaluated. At the hearing, Mandapat did not recall Aranas’ alleged last statement until it was suggested that the prior statements were not coercive.

“Q. (By Mr. Gora) Do you know Nash Aranas? A. Yes, sir.

Q. During March of 1966, did Mr. Aranas and you have a conversation concerning the union?

A. Yes, sir.

Q. Where did this conversation take place?

A. At Don the Beachcomber, sir.

Q. Approximately what date this . . . when did this conversation take place? A. About the 9th or the 10th.

Q. This is the month of March? A. Yes, sir.

Q. Was there anyone else present during this conversation? A. No, sir.

Q. What did Mr. Aranas say, and what did you say? A. Well, Mr. Aranas approached me and says, ‘So you are one of the union organizers.’ In a way of answering him, I just smiled, and I say, ‘Well, I am. I think it is right that we join the union.’

Q. Is that all that you remember being said during that conversation? A. I have to think for a minute, sir.

Q. Certainly. A. Yes, sir, that is about all.

Mr. Diederich: I will move that his answer be stricken as being totally irrelevant to any allegation contained in the complaint. It is not coercive or threatening. It is not a question."

Then after a long discussion between both counsel and the Trial Examiner (covering a page and a half in the transcript) as to whether or not the testimony indicated anything illegal or coercive, Mandapat, without further solicitation, picked up his cue:

"The Witness: Excuse me, your Honor, I recollect some of the conversation now.

Trial Examiner: Do you want to ask him some questions?

Q. (By Mr. Gora) If you recall anything else that was said, at this time please tell us now.

A. Yes. Like I said in a jokingly and smiling way, 'So what. I think it is right.' But, anyway, Mr. Aranas replied by saying, 'You boys are crazy. You don't know what you are going to be missing if you join the union.' He shook his head and walked away."

Another question that has never been answered is this: How is Aranas supposed to have known before the meeting that Mandapat was a union organizer? The above conversation is supposed to have taken place before the meeting, but it was not until the meeting that Mandapat indicated he was a union organizer.

Point Six:

It is not true, as the Board recites on page 7 of its brief, that Aranas told Nobello if the Palm Springs restaurant was unionized, Nobello would not be able to work in the Hollywood restaurant because it was

non-union. Nobello, on cross-examination, testified as follows:

“Q. Now, when Mr. Aranas asked you if you had signed a slip of paper—a white piece of paper—and you told him that you had, isn’t it a fact that he then said that he didn’t know if he could take you to Hollywood, because there was no union in Hollywood, and if a union came into Palm Springs there might be a conflict, and he wasn’t sure if he could take you? Isn’t that what he said? A. Yes, sir.

Q. He didn’t come right out and say that if you sign a union card you are not going to go to Hollywood, did he? A. Beg your pardon?

Q. He didn’t come out and say that if you sign a union card you are not going to go to Hollywood, did he? A. No.

Q. As a matter of fact, you did go to Hollywood, didn’t you? A. Yes, sir.” [R.T. 106.]

It is also noteworthy that at the meeting, which took place immediately after the above conversation, Aranas told everyone assembled “they were free to join the union if they wanted to,” that “it wouldn’t make any difference to the company,” that “it was up to them if they wanted the union they could join the union.” [R.T. 108.]

Aranas was not threatening Nobello, he simply was confessing ignorance. When he found out that it was possible for an employee from a union restaurant to work in a non-union restaurant, Nobello went to Hollywood.

Point Seven:

The Board claims the company's notice of March 31, 1966, Petitioner's Exhibit 3, was not timely and unambiguous.

It would have been more timely and specific had the Charging Party responded to Petitioner's March 15 letter to its attorney.

On March 11, the union's attorney wrote to Petitioner, alleging:

It has been brought to our attention by said union that some of your supervisory personnel have recently made statements to some of your employees which contained inferences of reprisals against them if they continue to support the union. [Charging Party Ex. 1.]

Petitioner's attorney promptly replied on March 15, as follows:

Our inquiries reveal no evidence of any unlawful action on the part of supervisory personnel of Don the Beachcomber. If you will be kind enough to advise us specifically what was allegedly said, by and to whom, and when, we shall be pleased to investigate the matter further. If such an investigation reveals violations, we certainly would recommend corrective measures for our client has no desire or intent to violate the law. Charging Party's Exhibit 2.

This letter was never answered by Charging Party, thus, Petitioner's willingness to be timely and specific was thwarted by the union's neglect.

The notice was posted on March 31, two days after the union filed its charge on March 29. It was as specific and timely as the union permitted it to be.

Point Eight:

In its argument and citation of cases, the Board intimates the union had “obtained authorization cards signed by a majority of the employees in an appropriate unit.”

In this case, the union never did obtain authorization cards signed by a majority of the employees in an appropriate unit, even though it falsely claimed that an “overwhelming” majority of such employees had signed cards.

Point Nine:

Petitioner, in its Exceptions to the Trial Examiner’s Decision, excepted to the finding that the union represented 27 of its employees. Exception No. 3. Since General Counsel’s proof of majority status consisted of 26 authorization cards and testimony that Jok Chan was a member of the union, the issue of whether he authorized the union to represent him was raised by Petitioner before the Board.

Coercion and Threats.

Second, a reply to the Board’s argument concerning coercion and threats is necessary.

Frederico Nobello: The Board places great reliance upon Aranas’ conversation with Nobello. First, the conversation was strictly between Aranas and Nobello. It had no effect upon the remaining 51 other unit employees. Second, on cross-examination, Nobello testified that Aranas did not threaten not take him to

Hollywood because of his union support, he only stated there was some doubt in his mind as to whether or not he could do it.

Ben Jordan: Aranas and Jordan were brothers-in-law and friends for many years. Aranas' simple, private inquiry about signing a card was non-coercive. See *NLRB v. McCormick Steel Company*, Fifth Circuit, July, 1967, F. 2d

Leonard Mandapat: Mandapat did not even recall he was ever threatened by Aranas until he got his cue from a discussion between both counsel and the Trial Examiner. In addition, his credibility, to be discussed below, was nil.

The Meeting: The Board in its brief (p. 13), attributing "lip service" to Petitioner, says "lip service to the policy and purposes of the Act is not sufficient." With that principle Petitioner heartily agrees, but does the Board? In announcing the rule requiring employers to supply the names and addresses of their employees for the use of unions in Board conducted elections, the Board said:

"The control of the election proceeding, and the determination of the steps necessary to conduct that election fairly (are) matters which Congress entrusted to the Board alone." In discharging that trust, we regard it as the Board's function to conduct elections in which the employees have the opportunity to cast their ballots for or against representation under circumstances that are free not only from interference, restraint, or coercion violative of the Act, but also from other elements that prevent or impede a free and reasoned choice. Among the factors that undoubtedly tend to im-

pede such a choice is a lack of information with respect to one of the choices available. In other words, an employee who has had an effective opportunity to hear the arguments concerning representation is in a better position to make a more fully informed and reasoned choice. Accordingly, we think that it is appropriate for us to remove the impediment to communication to which our new rule is directed. *Excelsior Underwear, Inc.*, 156 N.L.R.B. No. 11.

Are not employees who sign authorization cards without ever hearing the employer's views on unionization prevented and impeded from making a free and reasoned choice? And is not this more so when they are simple, gullible people and they sign the cards because they are told they will get a wage increase and health insurance if they do? [R.T. 54-55.] Could these employees not make a more fully informed and reasoned choice in an election after some of the potential disadvantages of unionization in the employer's view are pointed out to them?

Not one witness who testified about the meeting stated that Aranas threatened force or reprisals for union support. This was a clanish meeting among Filipino waiters and bus boys, "the boys." It was in the home of a waiter. Aranas was a long-time friend of many of "the boys" attending the meeting. He prefaced his remarks with an assurance the company would take no reprisals for union support, but suggested they consider the disadvantages as well as the advantages of unionization. Every comment he made was in the form of view, opinion, prediction or argument. These employees had a right to know that the

union might demand overtime and abandonment of the rotation system, two matters, which if acceded to by Petitioner, would be of vital interest to them.

If what Nash Aranas said at that meeting was illegal, then, in spite of the First Amendment to the United States Constitution and Section 8(c) of the Act, free speech for an employer in a union representation situation is non-existent.

The Board's decision in this case cannot be reconciled with its pious pronouncements on an employee's right to make a fully informed and reasoned choice.

See *N.L.R.B. v. River Togs, Inc.*, Second Circuit, July, 1967, F. 2d, where the Court said:

“Although the Board apparently thinks workers should be shielded from such disconcerting information, an employer is free to tell his employees what he reasonably believes will be the likely economic consequences of unionization that are outside his control, as distinguished from threats of economic reprisal to be taken solely on his own volition. Cf. Bok, *The Regulation of Campaign Tactics in Representation Elections under the National Labor Relations Act*, 78 Harv. L. Rev. 38, 77-82 (1964). If § 8(c), does not permit an employer to counter promises of pie in the sky with reasonable warnings that the pie may be a mirage it would indeed keep Congress' word of promise to the ear but break it to the hope.”

See, also, *Southwire Co. v. N.L.R.B.*, Fifth Circuit, August, 1967. F. 2d, where the Court stated:

“The guaranty of freedom of speech and assembly to the employer and to the union goes to the heart of the contest over whether an employee wishes

to join a union. It is the employee who is to make the choice and a free flow of information, the good and the bad, informs him as to the choices available. It is an adversary proceeding and hardly impartial but there is a limit. We conclude that Congress set the limit in § 8(c) and there is no contention that the limit contravenes the First Amendment. Whatever amounts to a threat of reprisal or force or a promise of benefits is beyond the pale. This is the congressional definition of coercion as used in *Thomas v. Collins*, *supra*.

“The law has developed in this area to distinguish between a threat of action which the employer can impose or control and a prediction as to an event over which the employer has no control. The threat is not privileged but the prediction is.”

Leonard Mandapat.

Third, a comment concerning the credibility of Mandapat must be made. Mandapat was General Counsel's whole case. He attempted to authenticate cards and testified threats and coercive statements were made by Aranas.

This Court need not blindly adopt the credibility resolutions of the Board when they are directly contrary to the evidence. Time after time, Mandapat changed his testimony or gave testimony which conflicted with prior testimony or sworn statements he had given to the General Counsel in connection with the investigation of the case. Cross-examining Mandapat was like chasing the elusive butterfly. Finally, he was uncovered in an outright lie, a lie which had led to the inclusion of paragraph 17 in the complaint.

Conclusion.

The question is whether Petitioner acted in bad faith in expressing its preference for the Board conducted election for which the union had petitioned, for, in reality, the union had already petitioned for an election before any refusal to recognize it.

Its good faith was shown by its efforts to correct any alleged illegal conduct on the part of its supervisory personnel and to dispel the effects of any such conduct. Of course, its efforts were rebuffed by the union, even though the union did acknowledge Petitioner's good faith:

We are certain that you do not intend to violate the Federal law and that you will cooperate with us in eliminating ill-advised comments by your supervisory personnel." [Charging Party's Ex. 1.]

The isolated conversations between Aranas and Nobello, and Aranas and his brother-in-law, Jordan, are no basis for a finding of illegal interrogation.

Finally, the comments of Aranas at the meeting were noncoercive and protected.

In order to do justice to the 26 unit employees who did not sign authorization cards, as well as those who signed in ignorance, the Board's order should be set aside.

Respectfully submitted,

SWEENEY, COZY & FOYE,

By M. J. DIEDERICH,

Attorneys for Petitioner.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

M. J. DIEDERICH

